2000

Central Florida Investments, Inc. v. ParkWest Associates, Beaver Creek Associates : Reply Brief

Utah Supreme Court

Mark R. Gaylord; Craig H. Howe; Ballard Spahr Andrews .
Allan L. Sullivan; Robert W. Payne; Todd M. Shaughnessy; Snell .

IN THE UTAH SUPREME COURT

CENTRAL FLORIDA INVESTMENTS, INC., **Plaintiff/Appellee,** **vs.** **PARKWEST ASSOCIATES and BEAVER CREEK ASSOCIATES,** **Defendants/Appellants.**	**Supreme Court No. 20000558-SC** **District Court No. 990600361-CR** **Priority No. 15**

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY, STATE OF UTAH, HONORABLE ROBERT HILDER

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Park West Associates and Beaver Creek Associates (collectively "PWA"), by and through counsel, submit this Reply Brief in support of their appeal from the trial court's denial of their Motion to Compel Arbitration.

INTRODUCTION

In its brief, Central Florida Investments, Inc. ("CFI") offers three arguments in support of the trial court's ruling: (i) the Arbitration Clause in Paragraph 12 of the Contract Addendum is not an enforceable arbitration provision; (ii) even if the Arbitration Clause is enforceable, it does not cover the instant dispute; and (iii) PWA waived its right to enforce the Arbitration Clause. See Brief of Appellee at 11-28. As shown below, each of these arguments fails. The Arbitration Clause is valid and should be enforced; the parties' dispute is squarely within the scope of the Arbitration Clause; and PWA has not waived its right to arbitration. This Court, therefore, should reverse the trial court's ruling and remand with instructions that an order be entered compelling arbitration of the parties' dispute.

ARGUMENT

I. THE ARBITRATION CLAUSE IS VALID AND SHOULD BE ENFORCED.

CFI cites, at length, case law indicating that arbitration will not be compelled unless the parties agreed to submit their dispute to arbitration. See Brief of Appellee at 11 (citing *Cade v. Zions First Nat'l Bank*, 956 P.2d 1073, 1077 (Utah Ct. App. 1995)). PWA agrees with this legal principle; indeed, it is the primary reason why the trial court erred in denying PWA's Motion to Compel Arbitration. The parties expressly agreed that "[a]ny

disagreement over the terms of this agreement **shall be arbitrated**." (See Contract Addendum; R. at 30; emphasis added). By refusing to compel arbitration, the trial court failed to give effect to the parties' agreement to submit to arbitration any dispute over the terms of the Contract.

Arbitration provisions must be construed in accordance with the parties' intentions. See *Reed v. Davis County School Dist.*, 892 P.2d 1063, 1064-65 (Utah Ct. App. 1995). Here, the parties' intention to arbitrate is clear from the first sentence of the Arbitration Clause. It is also evident from the parties' placement of the Arbitration Clause in the Contract Addendum, the terms of which expressly superseded the conflicting dispute resolution provisions in the body of the Contract that would have permitted litigation. (See Contract ¶¶ 15, 16; R. at 28). The Contract Addendum states:

> This offer supercedes the Real Estate Purchase Contract dated April 22, 1998. . . To the extent the terms of this Addendum modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control.

(Contract; R. at 26-27).

CFI apparently believes that if an arbitration clause does not define the arbitration process itself, as do various dictionary definitions of "arbitration," the clause is unenforceable. See Brief of Appellee at 12. CFI's argument in this respect is a red-herring. When a contract uses the term "arbitrate" or "arbitration" in describing the dispute resolution process selected by the parties, it is a term of art, carrying with it the very meaning set forth in the dictionary definitions quoted by CFI. See *Reed*, 892 P.2d at 1065 (indicating that term

"arbitrate" and "arbitration" are words of legal significance). There is no need for the contract to elaborate further on the meaning of arbitration.

CFI states that the Arbitration Clause "does not require any kind of determination by neutral third parties." Brief of Appellee at 13. This assertion is flatly contradicted by the Arbitration Clause itself, which states that disagreements "shall be arbitrated by parties agreed upon by both the Buyer and the Seller." (R. at 27; emphasis added.) Nothing in the Arbitration Clause suggests that the arbitrators selected will not be neutral third parties.

Moreover, contrary to CFI's assertions, the Arbitration Clause can readily be construed to provide for meaningful arbitration. Under fundamental principles of contract interpretation, the first and second sentences of the Arbitration Clause should be harmonized, to the extent possible. The first sentence states, "disagreement[s] over the terms of this agreement shall be arbitrated." (R. at 27.) Here, a central dispute between the parties is whether the Contract expired by its own terms on December 31, 1998, for failure to satisfy the Special Contingencies enumerated in the Contract. The Contract allowed CFI to purchase the subject property only if the Special Contingencies were satisfied, which included, among other things, that the development receive final Master Plan approval, and that the transaction close no later than December 31, 1998. (R. at 29.) Thus, the parties' dispute over whether the Contract expired by its own terms is a "disagreement over the

terms" of the Contract. The arbitrators may be called upon to resolve this dispute pursuant to the first sentence of the Arbitration Clause.[1]

The second sentence of the Arbitration Clause can be construed in harmony with the first sentence. The second sentence states, "[i]f agreement cannot be reached within 60 days from the beginning of the arbitration process Buyer shall receive its money back and this agreement shall be null and void." The second sentence may be viewed in at least two ways. First, it may be interpreted simply as imposing a 60-day time constraint within which the arbitration must be concluded. This interpretation comports with the parties' desire to avoid litigation and resolve any disputes out of court, by expeditious means, to avoid delays and complete development of the property prior to the 2002 Winter Olympic Games.[2] (See Plumb Aff.; R. at 157). Imposing such a time limit on the arbitration process is authorized by the Utah Arbitration Act. See Utah Code Ann. §78-31a-10 ("An arbitration award shall be made within the time set by the agreement").

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[1] If CFI had agreed to arbitrate this matter when PWA requested it in November 1999, this entire case would have been avoided. CFI has sued for breach of contract. One cannot sue for breach of a purchase contract if the conditions to closing have not been satisfied prior to the closing deadline. See, e.g. Wells v. L.W.A., Inc., 470 S.E.2d 510, 512 (Ga. App. 1996) (holding there can be no claim for breach of purchase contract where conditions were not satisfied as of closing deadline). Assuming the arbitrators were to determine the Contract expired by its own terms, there would be no basis for this lawsuit.

[2] Indeed, the trial court specifically found that "the Addendum provision regarding arbitration . . . is evidence that the parties were loathe to impede the development if the Agreement faltered and a dispute ensued." (Minute Entry, at 3-4; R. at 425-26).

Alternatively, the second sentence may be viewed as an agreement regarding the specific type of alternative dispute resolution process to be followed, and the default remedy to be ordered by the arbitrators in the event the agreed-upon process does not result in a resolution.[3] Courts have consistently held that contracting parties may determine their own dispute resolution process, and may limit the scope of the arbitrator's authority. See *City and County of Denver v. District Court*, 939 P.2d 1353, 1361 (Colo. 1997); *In re Clawson*, 783 P.2d 1230, 1231 (Hawaii 1989); *Board of Education v. Ewig*, 609 P.2d 10, 12 (Alaska 1980).[4] CFI has cited no case law or other legal authority indicating that parties to a contract cannot define their own arbitration process or limit the arbitrator's authority in this manner.

CFI complains that the default remedy of the second sentence (i.e., the return of CFI's $50,000 earnest money deposit) is not fair and should not be applied. CFI asserts, for the first time in the history of this case, that the default remedy is an unenforceable liquidated damages provision. (See Brief of Appellee at 16-17.) Again, CFI's argument fails. In the context of this Arbitration Clause, the default remedy cannot function as a liquidated damages provision. By definition, in a liquidated damages provision, the parties stipulate to a sum of money to be paid, as compensatory damages, in the event of a breach of the

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[3] Either way, the parties' dispute over the meaning of the second sentence of the Arbitration Clause represents a "disagreement over the terms of [the] agreement" which "shall be arbitrated" pursuant to the first sentence. See Arbitration Clause.

[4] CFI's attempt to distinguish these cases falls short. The minimal factual differences of the cases do not detract from the significance of the legal principle for which they stand, namely, that parties may define the scope of the arbitrators' authority.

contract. See *Woodhaven Apartments v. Washington*, 942 P.2d 918, 921 (Utah 1997). This avoids the necessity of proving the exact amount of damages sustained.

Here, the default remedy is not contingent upon a determination that a party has breached the Contract. It simply applies if the parties are unable to reach agreement on a dispute over the terms of the Contract. Questions of breach and liability never come into play. The default remedy does not even contemplate the payment of any compensatory damages, only the return of CFI's earnest money deposit.

In any event, regardless of how the second sentence of the Arbitration Clause is interpreted, it should not be construed to defeat the mandate of the first sentence that disagreements under the Contract "shall be arbitrated." The first sentence is clear, unambiguous, and controlling. It reflects the parties' intent to arbitrate disputes over the terms of the Contract.

More importantly, CFI is a sophisticated entity, one of the largest timeshare condominium developers in the world. It negotiated the terms of the Contract, including the Arbitration Provision, at arms-length. Under different circumstances, the default remedy may have worked to CFI's benefit and PWA's detriment. CFI cannot now complain of the bargain it made. The trial court erred in altering the parties' agreement on the arbitration process and default remedy set forth in the second sentence of the Arbitration Clause. Therefore, the trial court's refusal to compel arbitration ignored fundamental principles of contract interpretation and should be reversed.

II. THE PARTIES' DISPUTE PLAINLY FALLS WITHIN THE SCOPE OF THE ARBITRATION CLAUSE.

The parties' dispute constitutes a "disagreement over the terms" of the Contract, bringing it squarely within the Arbitration Clause. CFI's primary claim is that PWA failed to obtain Master Plan approval from Summit County, as allegedly required under the terms of the Contract. (See Complaint; R. at 6). Paragraph 6 of the Contract Addendum, however, requires the parties to submit their plans to the County **simultaneously**; and CFI failed to submit its own plan and architecture. (See R. at 494). CFI's other claims for damages likewise arise out of, and relate directly to, disagreements over the application and the effect of several key provisions of the Contract and the Contract Addendum. (See R. at 493-96).

CFI sidesteps the fact that its own claims relate to disagreements over the Contract's terms by arguing that Sections 15 and 16 of the Contract give it the right to bring an action in court. CFI's selective interpretation of the Contract, however, would render the Arbitration Clause meaningless and ignores the manifest intent of the parties to avoid litigation. CFI's interpretation also ignores the plain language of the Contract Addendum, which states that when a provision of the Contract Addendum modifies or conflicts with "any provisions of the REPC, including all prior addenda and counteroffers," the Addendum controls. (Contract; R. at 26-27). Here, Section 15 and 16 are modified by and conflict with the Arbitration Clause because they purport to address the manner of dispute resolution. Consequently, under the terms of the Contract Addendum, the Arbitration Clause supersedes Sections 15 and 16 of the Contract.

This application of the Arbitration Clause is firmly supported by CFI's own admission that Sections 15 and 16 broadly cover any dispute relating to the Contract. See Brief of Appellee at 18. In fact, if construed as proposed by CFI, Sections 15 and 16 would completely displace and swallow up the Arbitration Clause. For instance, if Sections 15 and 16 applied, as CFI suggests, the Arbitration Clause would be superfluous. Any dispute "over the terms of the Contract" could easily be characterized as a dispute or claim "relating to the Contract." As a result, any party disputing the terms of the Contract could classify its dispute as one "relating to the Contract" and file a lawsuit in the courts, thereby stripping the Arbitration Clause of any effect. CFI's interpretation of the Contract is unreasonable and fails to harmonize and give effect to all terms of the Contract.[5] In short, this Court should hold that the Arbitration Clause conflicts with and, by operation of the Contract Addendum, supersedes Sections 15 and 16 of the Contract.

III. PWA DID NOT WAIVE ITS RIGHT TO ARBITRATION UNDER THE STANDARDS SET FORTH IN *CHANDLER.*

CFI asserts that PWA waived its right to arbitration when it sought to have the *lis pendens* removed from the property. CFI relies heavily on *Chandler v. Blue Cross Blue Shield*, 833 P.2d 356 (Utah 1992), in which this Court stated that a "party claiming waiver

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[5] CFI argues that Section 15 provides for disputes involving "the breach or termination of" the Contract. Section 15, however, mentions such disputes only as an **example** of the broad range of disputes covered under that provision. Because of the breadth of Section 15, that section conflicts with, and is superseded by, the Arbitration Clause.

has the burden" to establish both that the party seeking arbitration has substantially participated "in litigation to a point inconsistent with the intent to arbitrate" and that it has been prejudiced. *Id.* at 358-60. A waiver of arbitration "'is not a favored finding, and there is a presumption against it.'" *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) (citation omitted).

In *Chandler*, this Court made clear that the determination of waiver is a highly fact-intensive inquiry. *Chandler*, 833 P.2d at 358. In PWA's case, the trial court made the factual determination that PWA had **not** waived its right to arbitration. (R. at 762-63.) As shown below, because CFI has failed to satisfy its heavy burden to rebut the presumption of non-waiver, this Court should reject CFI's argument.

A. PWA Has Failed to Show That PWA Participated in the Litigation in a Manner Inconsistent With the Intent to Arbitrate.

CFI argues that PWA's participation in this case was inconsistent with an intent to arbitrate. In particular, CFI cites the pleadings filed by PWA in connection with its Motion to Dismiss and to Quiet Title (the "Motion to Dismiss"). See Brief of Appellee at 23. CFI's arguments, however, focus exclusively on "substantial participation" and ignore the "intent" element of the *Chandler* test. Moreover, CFI fails to recognize a critical distinction between PWA's Motion to Dismiss and the proceedings discussed in the case law CFI cites.

1. PWA Was Forced to Move for Dismissal of the Action Because of the Threat of Irreparable Harm Created by CFI's *Lis Pendens*.

Following its receipt of CFI's complaint and the *lis pendens*, PWA did not have the luxury of simply moving to compel arbitration.[6] Rather, PWA had to act immediately to secure the release of CFI's wrongful *lis pendens* recorded against the entire seventy-five acre Frostwood parcel. PWA was forced, by CFI's recording of the *lis pendens*, to participate in the court proceedings, and properly invoked the emergency-relief provisions of the *Wrongful Lien Act*. (R. at 15-17).

Significantly, in none of the cases cited by CFI was a party required to seek immediate, emergency relief in court from a threat of irreparable harm caused by the lawsuit. In its Minute Entry on PWA's Motion to Dismiss, the trial court recognized the adverse effects of the *lis pendens* on the timely development of the entire Canyons SPA:

> [I]n the absence of the availability of specific performance, the justification for a Lis Pendens that **encumbers the property and impedes an admittedly time-sensitive project** is diminished. The equities weigh against permitting the Lis Pendens to remain, and **the Addendum provision regarding arbitration . . . is evidence that the parties were loathe to impede the development if the Agreement faltered and a dispute ensued.** To allow the Lis Pendens to remain in force under these circumstances would be absolutely contrary to that intention, and the **harm to defendants**

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[6] In a letter to counsel for CFI dated November 12, 1999, counsel for PWA expressly relied on the Arbitration Clause: "Paragraph 12 of Addendum Number 1 expressly provides that 'any disagreement over the terms of this agreement shall be arbitrated by parties agreed upon by both Buyer and Seller.' Paragraph 12 was included in the parties agreement for the express purpose of avoiding litigation." (Answer & Counterclaim, Ex. "3"; R. 18-19.)

> **and other affected parties far outweighs any potential benefit to plaintiff.** Plaintiff's own arguments . . . give cogent support to defendants' contention that delay in the proposed project threatens substantial loss to many parties.

(Minute Entry, at 3-4; R. at 425-26; emphasis added).

Indeed, assuming PWA had immediately filed and prevailed on a motion to compel arbitration, PWA still would have had to participate in initiating an arbitration proceeding, selecting arbitrators, and scheduling an arbitration hearing -- all without the assurance that the arbitrator could grant any emergency relief or order the release of the *lis pendens*. CFI completely ignores this critical procedural distinction. Because the *lis pendens* threatened to undermine the timely development of the entire Canyons SPA, PWA was forced to participate in the initial litigation. PWA, therefore, did not waive its right to arbitration by taking necessary measures in court to secure the release of the *lis pendens*. Accordingly, for purposes of the *Chandler* test, PWA did not "substantially participate" in litigation to a point "inconsistent with the intent to arbitrate." 833 P.2d at 358-60.

2. All the Pleadings or Other Filings Submitted by PWA Related Either to Obtaining Relief from the *Lis Pendens* or Were Required to be Filed Under the *Utah Rules of Civil Procedure.*

In arguing that PWA has waived its arbitration rights, CFI goes to great lengths to emphasize the number of pleadings or other documents filed by PWA. See Brief of Appellee at 23. CFI fails to note, however, that, PWA's submissions were filed either to obtain relief from the *lis pendens* or to comply with requirements of the *Utah Rules of Civil*

Procedure. CFI also fails to recognize that, in nearly all of PWA's early efforts to seek relief from the *lis pendens*, PWA repeatedly affirmed and preserved its right to arbitration.

For instance, most of PWA's arguments in its Memorandum in Support of Motion to Dismiss and to Quiet Title ("Dismissal Memorandum") were devoted to securing the release of the *lis pendens*. (Dismissal Memorandum at 15-23; R. at 93-101.) The remainder of the Dismissal Memorandum focused on PWA's arguments regarding the automatic termination of the Purchase Contract. Significantly, as an alternative to dismissal, PWA requested that the Court compel arbitration pursuant to the *Utah Arbitration Act*. (*Id.* at 14 n.3; R. at 102.) To enhance its ability to obtain a release of the *lis pendens*, PWA also filed a Counterclaim, which raised five claims for relief, including a claim for wrongful lien. All the claims for relief related directly to PWA's efforts to have the *lis pendens* removed or to the Arbitration Clause itself, or were compulsory counterclaims under Rule 13 of the *Utah Rules of Civil Procedure*:

- the First Claim for Relief sought a declaratory judgment, under the Arbitration Clause, among other grounds, that CFI had no basis to record the *lis pendens*;
- the Second Claim for Relief was brought under the *Wrongful Lien Act* to secure the release of the wrongful *lis pendens* recorded by CFI, and the trial court relied on PWA's wrongful lien claim in its Minute Entry ordering the release of the *lis pendens*;

- the Third Claim for Relief seeks relief on the grounds of estoppel arising from PWA's detrimental reliance on CFI's express promise to arbitrate the very type of dispute at issue in the lawsuit;
- the Fourth Claim for Relief is for breach of the covenant of good faith and fair dealing based, in large part, on CFI's failure to arbitrate its claims under the Purchase Contract; and
- the Fifth Claim for Relief is for breach of the Purchase Contract, a compulsory counterclaim under Rule 13.

(R. at 34-40.)

CFI also makes much of the fact that PWA participated in the preparation of a case management order and in the exchange of Rule 26(a) initial disclosures. See Brief of Appellee at 24. Such actions, however, are a far cry from the "five months" of discovery, including participation in depositions, conducted by the defendants in *Chandler*. *See* 833 P.2d at 360-61. Furthermore, PWA and CFI were required, under the time limitations of the new procedural rules, to participate in preparing the case management order and to exchange initial disclosures. *See* Utah R. Civ. P. 26(a).

PWA did not delay its efforts to enforce the Arbitration Clause. PWA filed its Motion to Compel Arbitration only **eight days** following the Court's entry of the Order on the Motion to Dismiss and only **five days** after the exchange of initial disclosures, which did not include the production of any documents. PWA's compliance with its

Rule 26 obligations, followed quickly by the filing of its Motion to Compel Arbitration, are not indicative of an intent to choose litigation over arbitration.

PWA's actions in this case have not demonstrated "an intent to proceed to trial." To the contrary, PWA responded to CFI's lawsuit with the intent to obtain emergency relief from the *lis pendens*, while at the same time reaffirming its right to arbitration. Upon securing relief from the lis pendens, PWA immediately moved to enforce its arbitration rights under the Contract. *See Williams*, 56 F.3d at 661 (concluding that party did not waive arbitration by removing action to federal court; filing motion to dismiss, answer, counterclaim, and motion to stay; and exchanging Rule 26 discovery). Under these circumstances, CFI cannot meet its heavy burden of showing that PWA has "substantially participated" in the litigation "to a point inconsistent with the intent to arbitrate." *Chandler*, 833 P.2d at 360. In sum, CFI fails to meet the first prong of *Chandler*.

B. CFI Has Failed to Meet Its Heavy Burden to Show Prejudice.

CFI has failed to show that it suffered prejudice as a result of PWA's actions in obtaining relief from the *lis pendens* and complying with its Rule 26(a) obligations. In *Chandler*, the court emphasized that the prejudice must "be of such a nature that the party opposing arbitration suffers some real harm." *Chandler*, 833 P.2d at 360. Here, PWA has suffered no such harm.

CFI argues that PWA obtained an unfair advantage by obtaining dismissal of CFI's claim for specific performance. See Brief of Appellee at 26. As shown above, however,

CFI's *lis pendens* threatened the timely development of the entire SPA. PWA had no choice but to seek immediate relief from the Court. Moreover, even though PWA succeeded in securing the release of CFI's *lis pendens*, the Court did not dismiss the action in its entirety, but permitted CFI to pursue its breach of contract claims.

CFI also contends that it has been prejudiced by PWA's "forum shopping." See Brief of Appellee at 26. CFI fails to offer any objective evidence, however, that PWA attempted to forum shop after testing the "'judicial waters.'" *Chandler*, 833 P.2d at 359 (citation omitted). Again, the trial court was the only forum in which emergency relief from the unlawful *lis pendens* was available.

Finally, CFI argues that it has incurred substantial expense as a result of PWA's litigation activities. The bulk of CFI's expenses, however, are of its own making and are attributable to defending its unlawful *lis pendens*, which was improper and threatened irreparable harm to the Canyons SPA. CFI's expenses relating to its defense of the Motion to Dismiss were incurred solely because of its own wrongful action in recording the *lis pendens*. Indeed, by letter dated November 12, 1999, counsel for PWA demanded that CFI release the unlawful *lis pendens* and explained that PWA would otherwise pursue a claim for wrongful lien. (R. at 539.) Having been given the opportunity to remedy the wrongful *lis pendens*, CFI cannot now be heard to complain about the expenses it has incurred.

Similarly, CFI cannot be heard to complain about expenses when CFI was the one who opposed every effort of PWA to use arbitration as the means of resolving the parties' dispute. Before taking action in court, PWA repeatedly requested CFI to arbitrate. Only

after CFI's refusals to arbitrate did PWA act in court. In short, PWA's limited and focused efforts to seek emergency relief from the *lis pendens* simply do not compare to the voluntary "extensive discovery" conducted by Blue Cross in *Chandler*. Also, CFI fails to note that much of PWA's early efforts in this case focused on asserting PWA's right to arbitrate the dispute. Such efforts to affirm the contractual right to arbitrate, by definition, cannot cause prejudice under the *Chandler* standard.

As shown above, CFI has failed to meet its heavy burden to show some "real harm" attributable to PWA's efforts to secure relief from the *lis pendens*. *Chandler*, 833 P.2d at 360. Therefore, this Court should reject CFI's arguments and refuse to affirm the trial court's order on the basis of waiver.

CONCLUSION

Based on the foregoing, this Court should reverse the trial court's order denying the Motion to Compel Arbitration and remand with instructions that an order compelling arbitration be entered.

RESPECTFULLY SUBMITTED this 30th day of January, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of January, 2001, I caused two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** to be mailed, via first class mail, postage prepaid, to:

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